Supreme Court, U.S.
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No. 01-704

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Petitioners

v.

THOMAS LAMAR BEAN,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE LAW ENFORCEMENT ALLIANCE OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Law Enforcement Alliance of America, Inc. (LEAA) is a non-profit, non-partisan advocacy organization made up to tens of thousands of law enforcement professionals, crime victims, and concerned citizens dedicated to making America safer. LEAA is committed to preservation of the rights guaranteed by the Bill of Rights, especially the Second Amendment guarantee of the right to keep and bear arms.

LEAA represents its members' interests by assisting law enforcement professionals, securing victims' rights over criminals' rights, seeking criminal justice reforms that target violent criminals, not law-abiding citizens, and explaining, from a law enforcement perspective, why firearms regulation is not effective in controlling crime.

Amicus Curiae submits this brief with the consent of the parties.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The failure of the Director of the Bureau of Alcohol, Tobacco & Firearms (hereinafter "BATF") to act on Bean's request for relief from the disabilities imposed by Federal laws with respect to firearms was a "denial" since the action met the criteria for final agency action under *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980).

The Appropriations Acts only deny funding to the BATF, not to the Secretary or any other agency of the Treasury Department, nor to the judiciary. Thus, as § 925(c) grants authority to the Secretary, Congress has not repealed or suspended § 925(c).

Because repeals by implication are not favored and there must be clear and convincing evidence of congressional intent to restrict access to judicial review, Congress' action in removing the BATF's authority to act upon requests for relief from disability cannot be viewed as also removing a district court's jurisdiction to conduct judicial review of such failure to act.

Construing the removal of the BATF's authority to act upon such requests as also removing a district court's jurisdiction to conduct judicial review results in the creation of an irrebuttable presumption that Bean is forever likely to act in a manner dangerous to public safety. Since irrebuttable presumptions are disfavored under the Due Process Clause of the Fifth Amendment, Congress' action in removing the BATF's authority to act upon requests for relief from the disabilities imposed by federal law with respect to firearms should not be

viewed as also removing a district court's jurisdiction to conduct judicial review.

The decisions of the courts of appeals in conflict with Bean are flawed as they ignored the rules of statutory construction regarding repeals by implication as established by this Court or determined that the BATF's failure to act was not a denial. Further, the courts of appeals overlooked the statutory powers of the district courts to direct probation officers to conduct investigations of applicants.

ARGUMENT

I. § 925(c) Grants The District Court Subject Matter Jurisdiction

A. Introduction

18 U.S.C. § 925(c) authorizes persons prohibited from possessing firearms under federal law to apply to the Secretary of the Treasury for "relief from the disabilities imposed by Federal laws with respect" to firearms.[2] The Secretary is authorized to grant such relief if, based on "the circumstances regarding the disability" and "the applicant's record and reputation," the applicant "will not be likely to act in a manner dangerous to public safety" and "granting of the relief would not be contrary to the public interest."

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[2] The administration and enforcement of Chapter 44 of Title 18, of which § 925(c) is a part, was granted to the Secretary. § 103, Pub.L. 90-618, 82 Stat. 1212 (1968).

In 1972, the Secretary created the BATF as a bureau within the Department of the Treasury and directed the BATF to "perform the functions, exercise the powers, and carry out the duties of the Secretary." Treas. Dept. Order No. 120-01 (formerly 221), 37 Fed.Reg. 11,696 (1972).[3] One of those functions, powers, and duties was the processing of applications for relief from disabilities. Despite the administrative delegation thirty (30) years ago, Congress has not amended § 925(c) to shift the authority to grant relief to the BATF. Thus, the authority remains in the hands of the Secretary.

In its current form, § 925(c) was enacted as part of the Firearms Owners Protection Act ("FOPA"), Pub.L. 99-308, 100 Stat. 449 (1986). As enacted in 1986, § 925(c) provides for judicial review:

> Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.

Petitioners argue that the district court did not have subject matter jurisdiction pursuant to § 925(c) over Bean's petition for judicial review since he was not "denied" relief from disabilities within the meaning of § 925(c) in that the BATF had

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[3] The functions, powers, and duties were "transfer[red]" from the Internal Revenue Service.

informed Bean:

> Since October 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief from Federal firearms disabilities.

The basis for Petitioners' assertion that Bean was not "denied" relief from disabilities was that, in the annual appropriations acts for the Treasury Department, the Treasury, Postal Service and General Government Appropriations Acts ("Acts"), Congress prohibited the expenditure of funds appropriated for the BATF to be used "to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)."

To support Petitioners' interpretation of the Acts as the Acts affect § 925(c), they rely upon the reasoning of several cases decided by the courts of appeals, including: *United States* v. *McGill*, 74 F.3d 64 (5th Cir. 1996), *Burtch* v. *United States Dept. of Treasury*, 120 F.3d 1087 (9th Cir. 1997), *Owen* v. *Magaw*, 122 F.3d 1350 (10th Cir. 1997), *Mullis* v. *United States*, 230 F.3d 215 (6th Cir. 2000); *McHugh* v. *Rubin*, 220 F.3d 53 (2d Cir. 2000); and *Saccacio* v. *ATF*, 211 F.3d 102 (4th Cir. 2000).

B. The Failure To Act On Bean's Request Was A Denial

In *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-40 (1980), this Court set out the indicia of finality for purposes of the availability of judicial review: the action of the agency must be a definitive statement of the agency's position; the action

must have a direct and immediate effect on the complainant; it must have the status of law; immediate compliance with the action is expected; and the question must be a legal one. No where did the Court suggest that an agency's failure to act deprives the district courts of jurisdiction. Indeed, such a proposition could not be countenanced since it would enable an agency to evade judicial review by the simple expedient of taking no action.

The BATF's failure to act on Bean's request for relief from disabilities fits every one of the *FTC* criteria. Thus, there was a final denial of Bean's request, which, if the district court was not deprived of jurisdiction by the Acts, the district court was compelled to review.

B. The Appropriations Acts Do Not Do Not Deprive The District Courts Of Subject Matter Jurisdiction

As the BATF's failure to act was a denial, the issue remains whether Congress intended to remove the district court's jurisdiction to review such denials. The starting point in addressing the issue is the language of the Acts and the language of § 925(c). *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991).

In *King* v. *St. Vincent's Hospital*, 502 U.S. 215 (1991), this Court held that "the meaning of statutory language, plain or not, depends on context." 502 U.S. at 221.[4] In relevant part,

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[4] The Court explained: "'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .' (citations omitted)." 502 U.S. at 221.

the Acts state:

TITLE I - DEPARTMENT OF THE TREASURY

Departmental Offices
Salaries and Expenses

* * * *

Bureau of Alcohol, Tobacco and Firearms
Salaries and Expenses

For necessary expenses of the Bureau of Alcohol, Tobacco and Firearms, . . . $768,695,000, . . . : *Provided*, That no funds made available by this or any other Act may be used to transfer the functions, missions, or activities of the Bureau of Alcohol, Tobacco and Firearms to other agencies or Departments in fiscal year 2001: . . . ***Provided further*, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)** . . . . *Provided further*, That no funds under this Act may be used to electronically retrieve information gathered pursuant to 18 U.S.C. 923(g)(4) by name or any personal identification code.

United States Customs Service
Salaries and Expenses

* * * *

General Provisions - Department of the Treasury

* * * *

This title may be cited as the "Treasury Department Appropriations Act, 2001".

Pub.L. 106-554, 114 Stat. 2763C-1, -4, -5, -11 (2000)(emphasis added).[5]

Thus, as the "funds appropriated herein" language (in bold above) refers to those funds appropriated to BATF, the denial of funds is solely to the BATF. *Cf.* "*Provided further*, That *no funds under this Act* may be used to electronically retrieve information gathered pursuant to 18 U.S.C. 923(g)(4) by name or any personal identification code." (emphasis added.).[6]

Although § 925(c) authorizes the *Secretary* to grant relief from disability, Congress did not deny funds to any other agency of the Treasury Department (e.g., Secret Service,

[5] In relevant part, the Acts have not changed from year to year.

[6] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Customs Service, IRS, Inspector General)[7] or indeed, to any other executive branch department[8], or, most significantly, to the judiciary.[9] Despite this focused action by Congress,

[7] The proviso that "no funds . . . may be used to transfer the functions, missions, or activities of the [BATF] to other agencies or Departments" does not deny funds to the Secretary since he is not another agency or Department. The proviso also does not deny funds to another agency of the Treasury Department. Because the BATF has been denied the function, mission, or activity of processing applications for relief from disability, if the Secretary chose to have another agency within the Treasury Department process applications, he would not be using funds to "transfer" a function, mission, or activity of the BATF to another agency of the Treasury Department, but rather would be redirecting a function, power, or duty.

[8] It is thus patently untrue that "Congress has deliberately and unequivocally suspended the *Executive's* ability to implement [§ 925(c)]." Brief For The Petitioners 13 (emphasis added).

[9] An attempt was made in 1996 to amend the appropriations bill to prohibit judicial review, but it failed. The bill (which would be enacted as the Treasury, Postal Service, and General Government Appropriations Act, 1997) included the following, with the explanation that, as reported by the Committee on Appropriations, "the parts of the bill intended to be stricken are shown in boldface brackets":

> Provided further, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c) **(and the inability of the Bureau of Alcohol, Tobacco and Firearms to process or act upon such applications for felons convicted of a violent crime, firearms violations, or drug-related crimes shall not be subject to judicial review)**: Provided further, that such funds shall be available to investigate and act upon applications filed by

Petitioners views the Act as also depriving the district court of subject matter jurisdiction.

While Congress certainly may use appropriations acts to amend substantive legislation, it is a "cardinal rule . . . that repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). More particularly, this Court has stated, with regard to repeals by implication in appropriations bills:

> The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." (citation omitted). This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.

TVA v. *Hill*, 57 L.Ed. 2d 117, 143-44 (1978).

This doctrine is not the only governing rule of statutory construction in the case at bar: there must also be "'clear and convincing' evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review." *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974). Here, because

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> corporations for relief from Federal firearms disabilities under 18 U.S.C. 925(c) . . . .

142 Cong. Rec. S10139, 10141 (Sept. 10, 1996). The above remains the current version, without the stricken language.

Congress did not amend the appropriations for the judiciary, that "clear and convincing" evidence is lacking. Thus, the Acts cannot be construed to restrict access to the judicial review provided by § 925(c).

Finally, in construing the Acts, the effect on Bean's constitutional rights of Petitioners' construction of § 925(c) and the Acts must be taken account of to avoid a result which would render the Acts unconstitutional.[10]

In *Heiner* v. *Donnan*, 285 U.S. 312 (1932), this Court held:

> [A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteen Amendment.

285 U.S. at 329.

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[10] In *Meachum* v. *Fano*, 427 U.S. 215 (1976), this Court said of liberty interests:

> "[A] person's liberty is equally protected, even when the liberty itself is a *statutory creation* of the State. The touchstone of due process is protection of the individual against arbitrary action of Petitioners . . . . (citation omitted)." (emphasis added).

427 U.S. at 226.

Thus, a liberty interest may be created by statute. The liberty interest in the case at bar is that created by § 925(c), which gives Bean the right to apply for relief.

Subsequently, in *Vlandis* v. *Kline*, 412 U.S. 441 (1973), the Court reiterated:

> Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.

412 U.S. at 446.

Vlandis thus concluded:

> [A] permanent irrebuttable presumption of nonresidence . . . is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents.

412 U.S. at 453.

Petitioners' contention that the Acts deprived the district court of subject matter jurisdiction places Bean in the same position as the students in *Vlandis*; he has no opportunity to demonstrate that he will not be likely to act in a manner dangerous to public safety and that granting relief from disabilities would not be contrary to the public interest.[11] Thus,

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[11] *Vlandis* remains good law even after *Weinberger* v. *Salfi*, 422 U.S. 749 (1975) as *Weinberger* did not overturn *Vlandis*. Rather, *Weinberger* distinguished the statute it was reviewing from that at issue in *Vlandis* as follows:

> The Court [in *Vlandis*] held that where Connecticut purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue. . . . Unlike the statutory scheme in *Vlandis*, the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible.

422 U.S. at 771-72.

Indeed, this Court went to note that "appellees are completely free to present evidence that they meet the specified requirements . . . ." 422 U.S. at 772.

if the Acts are construed as depriving the district courts of subject matter jurisdiction, they violate the Due Process Clause of the Fifth Amendment.[12] To avoid that result, the Acts should not be construed as repealing or suspending § 925(c): "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

Applying the above rules of construction to the Acts compels the conclusion that the Acts' prohibition must be very narrowly construed and limited to its literal language, i.e., that

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[12] In enacting the FOPA, Congress found, *inter alia*, that " (1) the rights of citizens – (A) to keep and bear arms under the second amendment to the United States Constitution; . . . (C) . . . *assurance of due process under the fifth amendment* . . . require addition legislation to correct existing firearms statutes and enforcement policies . . . ." § 1, 100 Stat. 449 (emphasis added).

the *BATF*, and no other entity, is prohibited from "investigat[ing] or act[ing] upon applications for relief" and nothing more.

Had Congress intended to repeal § 925(c) or to preclude judicial review of BATF's failure to grant relief from firearms disabilities, it could very easily have stated that § 925(c) was repealed or that the judiciary was denied funds to consider petitions for review. Congress has done neither.[13]

D. The Decisions Of The Courts Of Appeals In Conflict With *Bean* Rely Are Flawed

The cases upon which the Petitioners relies are each flawed and their reasoning should be rejected by this Court.

Turning first to *McGill, supra*. Despite the clear language of the § 925(c) and the Acts, the court of appeals founded its holding on a statement in the Senate Appropriations Committee Report concerning the activities of the BATF with

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[13] While congressional silence is not useful legislative history, the failure of affirmative efforts to amend statutes shed some light on congressional intent. *See Hutto v. Finney*, 437 U.S. 678, 694 (1978) ("Congress' intent was expressed in deeds as well as words. It rejected at least two attempts to amend the Act"). With respect to § 925(c), S. 1068, the "Stop Arming Felons (SAFe) Act," would have amended the first sentence of § 925(c) to insert "(other than a natural person)" after the word "person," the effect of which would be that no natural person could apply for relief from disabilities. 141 Cong. Rec. S10570-71 (July 24, 1995). The bill failed to pass.

regard to applications for relief from disabilities.[14] 74 F.3d at 67. Based on that statement, the court held:

> We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications.

Id. [15]

In so holding, *McGill* overlooked the fact that the Report made *no* mention of the powers of the judiciary, but simply focused on the BATF.

Moreover, the court of appeals did not review any of the hearings that were the basis for the statement found in the Senate Appropriations Committee Report. At the Senate subcommittee hearing, "the Director of the ATF responded to

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[14] As succinctly explained by the U.S. Court of Appeals for the District of Columbia Circuit: "Committee reports, we remind, do not embody the law. Congress, as Judge Scalia recently noted, votes on the statutory words, not on different expressions packaged in committee reports. *Hirschey* v. *FERC*, 777 F.2d 1, 7-8 & n. 1 (D.C. Cir. 1985) (Scalia, J., concurring)." *Abourezk* v. *Reagan*, 785 F.2d 1043, 1054-55, n. 11 (D.C. Cir. 1986).

[15] While the *McGill* court held that the district court lacked subject matter jurisdiction, it did not hold that the failure to act upon an application was not a "denial" within the meaning of § 925(c). Rather, the court concluded that "Congress has suspended the relief provided in § 925(c) for individuals." 74 F.3d at 68.

questions pertaining to the relief provisions. *See* Treasury, Postal Service, and General Petitioners Appropriations for Fiscal Year 1993: Hearings on H.R. 5488 Before the Subcomm. Of the Senate Comm. on Appropriations, 102d Cong. 69 (1993)." *Bean* v. *United States*, 89 F.Supp. 2d 828, 834 (E.D.Tex. 2000).

> The Director testified that although "every year about 3,000 to 4,000 people express an interest in (applying for relief)," only 1,000 applications (approximately) are found eligible to be acted upon. *Id.* However, the ATF had requested $3.7 million to fund the relief from disabilities program for the 1993 fiscal year. *Id.* According to these numbers, the ATF was spending an average of $3,700 per investigation.

89 F.Supp. 2d at 834.

In view of the Director's testimony, it is apparent that Congress' purpose in prohibiting the BATF from expending funds was to prevent the BATF from continuing its inefficient and wasteful procedures rather than eliminating the availability of relief itself. Had that been Congress' purpose, it would have clearly conveyed that purpose by prohibiting the expenditure of funds by the Secretary or his delegate, as it is the Secretary, not the BATF, upon whom § 925(c) imposes the duty to process applications for relief from disabilities.

Further, the court of appeals founded its conclusion on what it could "conceive" and ignored the rules of construction enunciated in *Posadas*, *supra*, *TVA* v. *Hill*, *supra*, and *Johnson*

v. *Robison*, *supra*, to wit, that there must be clear intent to repeal § 925(c) or to preclude judicial review of BATF's failure to grant relief from firearms disabilities. In addition, the court of appeals did not consider the consequences for McGill's Fifth Amendment right not to be deprived of a liberty interest without due process.

McGill also concluded that the federal courts "do not have the manpower or expertise to investigate or evaluate these applications." 74 F.3d at 67. That conclusion is both immaterial and overstates the burden on the district courts.

It is immaterial since the policy question of whether the district courts should review the denial of applications for relief from disability is for Congress to make. That Congress has neither repealed the judicial review provision of § 925(c) nor prohibited the expenditure of funds by the judiciary on determinations pursuant to § 925(c) evidences that Congress has made the policy judgment that the district courts *should* determine applications for relief from disability.

The "manpower" burden on the district courts is governed by the criteria set forth in § 925(c), i.e., the matters to be considered are only "the circumstances regarding the disability, and the applicant's record and reputation . . . ." The "circumstances regarding the disability" require little effort to determine since they are set forth in a court record. Similarly, the "applicant's record and reputation" are readily determinable since the district court's probation office routinely, in preparation of Presentence Reports, obtains individuals' records and investigates their backgrounds, including interviewing family and others. 18 U.S.C. § 3552(a); Rule 32(b)(4),

Fed.R.Crim.Pro.[16] If there was any question concerning the district courts' authority to utilize probation officers to conduct investigations, 18 U.S.C. § 3603 broadly commands, *inter alia*, that, in addition to specific enumerated duties, a probation officer shall "perform any other duty that the court may designate." Thus, there is clear statutory authority for district courts to have probation officers conduct investigations of applicants for relief from disabilities.

Moreover, since it is the applicant's burden to prove his eligibility, he can produce witnesses to testify at a hearing, including character references (such as family members, employers, and neighbors), to establish his "reputation." Such a hearing is not only within the institutional competence of a district court, but could be readily conducted.

It is also not the case that the district court lacks the "expertise" to make determinations concerning relief. District courts, in determining conditions of release (18 U.S.C. § 3142),

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[16] That report must contain, *inter alia* --

> (A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment . . . and
>
> (H) any other information required by the court.

Rule 32(b)(4), Fed. R. Crim. Pro.

sentencing convicted criminal defendants (18 U.S.C. § 3553), and reviewing violations of probation (18 U.S.C. § 3565) regularly evaluate the likelihood that an individual will be a threat to public safety. Indeed, district courts are institutionally *better* equipped than the BATF to make such judgments since the BATF is an investigative agency focused on arrests and prosecutions, whereas district courts are adjudicative in nature.

Finally, if the district courts consider grants of relief from disabilities, much of the financial burden with which Congress was concerned would be placed on the applicant since he, not the BATF, would be responsible for paying court costs and his own attorney's fees. In addition, if facts alleged by an applicant did not "have evidentiary support," the applicant could be assessed sanctions, including "an order to pay a penalty into court" and "reasonable attorneys' fees" pursuant to Rule 11, Fed.R.Civ.Pro.

In short, the burden on the district court is minimal.

Turning to *Burtch*, *supra*, while the Ninth Circuit properly ignored the legislative history relied on in *McGill*, the court nonetheless failed to heed the teachings of *Posadas*, *supra*, *TVA* v. *Hill*, *supra*, and *Johnson* v. *Robison*, *supra*, or the impact on Burtch's right to due process in concluding that "the failure to appropriate investigatory funds should be interpreted as a suspension of that part of section 925(c) which is affected." 120 F.3d at 1090.

The court in *Burtch* justified its conclusion in part by stating that "the statute does not authorize the district court to build a record from scratch or make discretionary policy

determinations in the first instance if the Secretary does not." *Id.* Neither of these conclusions is supported by the language and history of § 925(c).

First, § 925(c) authorizes the district court to "admit additional evidence where failure to do so would result in a miscarriage of justice." Plainly, therefore, the district court may build whatever record is necessary to avoid "a miscarriage of justice." The use of the word "additional" does not suggest that there must first be an administrative record. If that were so, the Secretary could effectively preclude *any* judicial review by denying applications without making an administrative record, even when funding existed. Clearly, Congress did not intend such a result. Rather, Congress sought to allow the district court to admit whatever evidence was necessary for the court to make an informed decision.

The legislative history supports such an understanding. Senator Hatch, the FOPA floor manager, inserted into the record a comparison of existing law with the Senate and House versions of FOPA. 132 Cong. Rec. S5351 (May 6, 1986). Existing law was described in part as follows:

> Relief from disabilities of conviction of a crime punishable by imprisonment for a term exceeding 1 year may be granted by the Secretary if satisfied that relief would not be contrary to public interest and safety. A person is ineligible to apply if his crime involved the use of a firearm or other weapon or if convicted of a violation of the Gun Control Act or the National Firearms Act [18 U.S.C. 925(c)]. Judicial review is limited to the administrative record to determine if a reason existed for denial of relief.

Id. at S5354.

By contrast, the Senate and House versions of S. 49 (FOPA) were described as follows:

> Allows relief for all categories of persons having Federal firearms disabilities and removes the bar to relief for felons whose crimes involved or whose conviction was for a violation of GCA or NFA. Expressly provides for judicial review and *the court may hold a trial de novo*.

Id. (emphasis added).

Because Congress contemplated that the reviewing court would not be bound by an administrative record where none exists ("the court may hold a trial de novo"), a full record may be created by the court in the trial *de novo*.

Second, § 925(c) does not call for the district court to make "discretionary *policy* determinations . . . ." *Burtch*, 120 F.3d at 1090 (emphasis added). Rather, the statute authorizes the Secretary, in the first instance, to determine, based only on "the circumstances regarding the disability, and the applicant's record and reputation," whether the applicant "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." Thus, there is no "policy" decision to be made by the

Secretary.[17] *A fortiori*, there is no "policy" decision to be made by the district court. Rather, the district court would only evaluate "the circumstances regarding the disability, and the applicant's record and reputation" and determine whether the applicant "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

Since the statute authorizes the district court to "admit additional evidence where failure to do so would result in a miscarriage of justice," it is evident that Congress intended the district court to review the evidence itself and make its own independent determination of the applicant's potential for acting dangerously and contrary to public safety, based upon "the circumstances regarding the disability, and the applicant's record and reputation . . . ." As discussed above, such an evaluation is

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[17] The "established to his satisfaction" language does not grant "broad discretion to the Secretary" as contended by Petitioners. Brief of The Petitioners 14. In *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934), this Court held about the term "established to the satisfaction of the Commissioner":

> Only by inadmissible straining could it be held to invest the Commissioner with absolute authority or discretion . . . . A more rational view is that it is largely admonitive and means that the additional element is not lightly to be inferred but to be established by proof which convinces in the sense of inducing belief. Such words often are so construed where applied to one who, like the Commissioner, is charged with the duty of ascertaining a matter of fact as a basis for further action.

291 U.S. at 397-98.

well within the institutional competence of the judiciary.

The third case relied on by Petitioners, *Owen* v. *Magaw*, *supra*, primarily focused on the language in § 925(c) which authorizes "the Secretary" to grant relief.[18] Thus, according to the Tenth Circuit, because the "only role for the judiciary is judicial review of a *denial* of relief" (emphasis added), the district courts cannot act where the Secretary has failed to consider an application for relief. 122 F.3d at 1354. While not expressly stated, the Tenth Circuit apparently did not view the Secretary's failure to act as a "denial," thereby barring judicial review. The Secretary's failure to act, however, must be viewed as a denial since it is plainly a final decision.[19] When properly viewed as a denial, it follows that the district court may act.

In the next case relied on by Petitioners, *Mullis*, *supra*, the court of appeals held that "the statute contemplates judicial review of the discretion exercised by the Secretary in denying an application, not independent judicial discretion exercised in a de novo review of an application." 230 F.3d at 219. As discussed, *supra*, however, the fact that the district courts are to "admit additional evidence where failure to do so would result in a miscarriage of justice" indicates that district courts are to make independent determinations, i.e., *de novo*. That conclusion is buttressed by the Senate floor debate discussed

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[18] *Owen* v. *Magaw*, *supra*, also adopted the reasoning of *McGill* concerning the district court's "manpower and expertise . . . ." 122 F.3d at 1354. *Owen*'s reasoning is without foundation for the reasons set out, supra.

[19] See *FTC* v. *Standard Oil Co.*, *supra*.

above. Thus, the court of appeals misinterpreted § 925(c). The court of appeals also erred in concluding that district courts are "without the tools necessary to conduct a systematic inquiry into an applicant's background." 230 F.3d at 219. As noted previously, with the district court's authority over probation officers, the district court is more than adequately equipped to conduct a thorough investigation of an applicant.

In *McHugh*, *supra*, the court of appeals stated that the "sole, dispositive question . . . is whether the ATF 'denied' McHugh's petition." 220 F.3d at 60. In answering the question in the negative, the court of appeals held that "the word 'denial' connotes more than a mere refusal to act." Id. The court of appeals did not, however, consider this Court's decision in *FTC* v. *Standard Oil Co.*, *supra*, where this Court set out the indicia of finality for purposes of the availability of judicial review and in which this Court did not suggest that an agency's failure to act deprives the district courts of jurisdiction. As noted earlier, this Court did not suggest that an agency's failure to act deprives the courts of jurisdiction since such a holding would enable an agency to avoid judicial review by the simple expedient of taking no action.

Finally, in *Saccacio*, *supra*, the court of appeals concluded that the BATF's failure to "act upon Saccacio's application" was not a denial because it "is not 'an adverse determination on the merits' . . . ." 211 F.3d at 104. Once again, as with *McHugh*, *supra*, the court of appeals did not, consider this Court's decision in *FTC* v. *Standard Oil Co.*, *supra*. Thus, the court of appeals erred in holding that the BATF's failure to "act upon Saccacio's application" was not a denial.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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